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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. BYRON SMITH, Defendant and Appellant.	B218782 (Los Angeles County Super. Ct. No. BA333885)

APPEAL from a judgment of the Superior Court of Los Angeles County. Marcelita Haynes, Judge. Affirmed.

Siri Shetty, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Yun K. Lee and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

Byron Smith was convicted of possession for sale of cocaine base (Health & Saf. Code, § 11351.5). He claims that his conviction should be reversed because there was substantial evidence that he was not competent to stand trial, but the trial court did not order a competency hearing. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On December 19, 2007, Byron Smith was arrested by police after he was observed participating in what officers believed was a drug sale. On January 18, 2008, he was charged by information with sale of a controlled substance (Health & Saf. Code, § 11352, subd. (a)) and possession for sale of cocaine base.

From the start of the legal proceedings, Smith was frequently dissatisfied with his legal representation. He made his first *Marsden*[1] motion to have his counsel removed at the preliminary hearing; it was denied. He made a second *Marsden* motion concerning the same counsel at his arraignment; this too, was denied. On March 17, 2008, he made another *Marsden* motion when the trial court would not entertain his personal request for a hearing on a strike prior because he was represented by counsel. This *Marsden* motion was also denied. Displeased that he could not make his own legal arguments directly to the judge while represented by counsel, Smith moved to represent himself. Smith, however, was uncertain whether he wanted to represent himself and asked for additional time to decide; the court ordered the question of Smith's representation to be addressed at the next court hearing.

At the next substantive court hearing, on April 8, 2008, Smith made another *Marsden* motion. This, too, was denied. Smith moved to represent himself, and the court extensively discussed self-representation with him. The court then asked Smith, "Now that you've read this whole form, do you still want to represent yourself?" Smith asked if he could still give his appointed counsel "another chance," and the trial court agreed. At

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[1] *People v. Marsden* (1970) 2 Cal.3d 118.

the next court hearing, on April 22, 2008, Smith informed the court that he did want to represent himself, and his *Faretta*[2] motion was granted.

In July 2008, Smith represented himself in conjunction with his motion to suppress evidence under Penal Code[3] section 1538.5. He extensively cross-examined a police detective who had participated in his apprehension. As the examination proceeded, the trial court instructed Smith to confine his questions to the limited issues presented by a suppression motion; to refrain from arguing with the witness; and not to ask the witness to testify concerning elements of the offense. When his questioning was curtailed and the prosecution's objections were sustained, Smith complained, "You know, Your Honor, you're not allowing me to build a defense." After the officer testified, Smith sought and obtained a continuance of the hearing so that he could bring in additional witnesses.

At the time for the resumed hearing, Smith informed the court that he had not brought any witnesses and that he did not wish to proceed further with his suppression motion because there were "too many misconceptions." When the court inquired further, Smith stated, "There was a lot of problems" and that because of those problems "I don't want to go any farther with the hearing." When the trial court turned to permit the prosecutor to make his argument on the suppression motion, Smith interjected, "Before we do that, I have a [section] 995 [motion] based on [section] 1385—pursuant to [section] 1538.5 compound motion." The court informed Smith that it was planning to conclude the suppression motion before any other motions were heard, afforded Smith the opportunity to argue the suppression motion, and ultimately denied the motion after Smith declined to argue. Smith immediately began arguing with the court, which prompted the court to remind him that he had just declined to present argument. Smith argued that there was no probable cause, and the court reiterated its ruling and asked for Smith's next motion.

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2 *Faretta v. California* (1974) 422 U.S. 806.

3 Unless otherwise indicated, all further statutory references are to the Penal Code.

Smith said, "Excuse me, Your Honor. I like to do a [Code of Civil Procedure section] 170.6 [motion]. I want my case transferred to another venue. I feel threatened. I feel mentally disturbed being here and also feel fear for my life being here. I feel threatened with my case. I feel like [I'm] not getting a fair trial—pretrial hearing in here. I really like to have my case transferred to another venue. I would really like to." The court responded, "Mr. Smith, I'm not sure you can do it at this point." Smith said, "Why is that? Everything is denied. Everything is denied, and I'm scared to have you hear my motions because you threaten me when you hear motions. I'm scared for my life being in your court. I really are [*sic*]. I feel threatened. I feel disturbed. I feel—." The trial court tried to speak, but Smith continued, "I haven't done anything. I respected you whole time I been here." He said, "I try my best to get along. I haven't even committed a crime, but I am being treated like—man, you know what I mean. The officer clearly stated I did not do it. You still found me guilty on 1538.5. I don't know what it is. [¶] There was [*sic*] four officers. No other officer came to testify but Mr. Thompson [*sic*] Penson. If I have to go to the expense of trial, that's double jeopardy. I haven't done anything. I'm in here for just being me. I'm just being me. Maybe it's color. I'm sorry, but I was born like this, and I can't help it. This is the way God created me. I'm very sorry."

The court responded, "Mr. Smith, I don't know what you think I've done to indicate that because you're an African-American that—" and Smith cut in, "I don't know what it is, but I feel fear for my life, and I feel threatened. I would like to do a 170.6 because I feel mentally disturbed behind this issue. I really do. I swear I do." The court briefly adjourned to research the timeliness of a Code of Civil Procedure section 170.6 motion and returned to inform Smith that it was in fact too late to seek disqualification under that statute. Smith responded, "Why is it too late?" "That's the law," the court answered. Smith said, "It's not the law. You bending the law for the fact I told you before." At that point, the bailiff told Smith to let the judge speak. The court provided a copy of a decision to the prosecutor and to Smith, advising them that it believed that this decision established that disqualification under Code of Civil Procedure

section 170.6 was no longer available. Smith asked, "Saying no due process for me to file any kind of motion on dismissal?" The court responded, "Mr. Smith, you just look at this, and the People will look at it. You can come back on Monday after you've looked at this, and we'll talk about it again."

Smith moved for disqualification of the judge nonetheless, and his motion was denied as untimely. The court appointed Smith an investigator and also appointed standby counsel for him. Smith later obtained multiple continuances of the trial date. On November 12, 2008, both sides announced ready for trial, and the matter was transferred for trial. On November 14, 2008, however, Smith claimed he was not ready for trial "due to lack of evidence." Smith gave up his status as a self-represented litigant and counsel was appointed to represent him. Over the next several months, a *Pitchess*[4] motion Smith had filed while representing himself resulted in discoverable materials being released to the defense and Smith made multiple *Marsden* motions.

In August 2009, the matter was transferred to a new judge for trial. Smith immediately began criticizing his counsel's performance and attempting to address the court concerning his prior convictions and his apparent belief that one did not constitute a strike offense.

During voir dire, once the jurors had left the courtroom, the trial court instructed Smith, "There are no outbursts. I've given you a pencil. No more outbursts, okay." The court reminded Smith that he was not representing himself, and Smith responded, "I was not talking. That was my lawyer who spoke to me." The court said, "No. You were the one that pointed." The court stated that Smith had spoken "[v]ery loudly," and explained, "That's why I've given you a pencil. And I—I know that you need to communicate with your attorney. But no more speaking to the jurors or pointing to them in any way by yourself." Smith denied speaking to the jurors and said that he said only "Number twenty" to his counsel, whom he alleged to be hearing-impaired. The court responded

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[4] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

that Smith had been so loud "that I felt it. I would not have admonished you in front of the jury had I thought it was inappropriate."

Once his counsel accepted the jury as constituted, outside the presence of the jury, Smith objected that the defense had "six more," presumably meaning peremptory challenges. The court responded, "That was up to your attorney, sir. You did. That's up to your attorney. That decision has been made. He accepted the jury as the way it's constituted. And, that is the jury that you have." Proceedings then concluded for the day.

The following morning, just as the case was being called, Smith addressed the judge: "Your Honor, he's trying to plant evidence on me. I—don't—." The next entry in the record is that the court said, "Ladies and gentlemen, would you take that door right there. Please. Open the—please open the door and—open the door right now." Smith said, "They're trying to send me to prison." The court instructed Smith to be quiet and said, presumably to jurors she was instructing to leave the courtroom, "You see to your right? There's a jury room. Just go in." Once the court had ensured that Smith had been secured, she asked Smith if he would behave himself. The bailiff then reported that Smith had cut himself, and Smith said, presumably referring to the bailiff, "You're trying to plant drugs on me. I'm not going to let him do that."

Once Smith was removed from the courtroom, the court described what had occurred for the record: "The defendant is not present after an outburst in the court. [¶] Apparently he had, some kind of way, secreted a weapon—namely, a razor blade—and has cut himself in some type of fashion. I was not a personal witness to that. [¶] Sheriff['s] Department has transferred him—transported him to the hospital for further treatment. I'm not sure whether he's available at this time. [¶] I know you wish to make a motion, but I think it's a little premature until we have his presence." The court indicated that its plan was to instruct the jurors to disregard whatever they heard or observed and to permit it to have no bearing on their judgment in the case.

Once the court was in session again with Smith present, the defense moved for a mistrial based on the courtroom incident. Defense counsel argued that the jury had seen what occurred, that it was material to the facts of the case, and that jurors' decision-

making would be impacted by the incident they witnessed. The prosecutor argued that the jury saw very little, and that because the conduct was Smith's own, any minimal prejudice that arose from it was attributable to Smith himself, so no mistrial should be declared. The court denied the motion for a mistrial, noting how very deliberate and planned Smith's behavior appeared to be: "The court will give an instruction for the jury to disregard the behavior of Mr. Smith. [¶] I note that the bailiff had walked all the way over to where Juror No. 7 was seated, asking him to remove his cap. Mr. Smith waited until the bailiff got directly behind him to start his behavior which was calculated, absolutely calculated, to attempt to get a mistrial."

As soon as the trial court denied the mistrial motion, Smith asked to speak to the judge. The court told him no, and warned him that further outbursts would result in his removal from the courtroom while the case proceeded. Smith immediately asked for a *Marsden* hearing, asking that his lawyer be removed on the basis of a conflict of interest and that "[t]hat's what a lot of this stuff is about." Smith proceeded to inform the court that "I did five *Marsdens*. I also said in Department 114—I told him I'm mentally disturbed nine months ago. I have a psych history. I have been in the mental hospital two times. And I told him there. And I told him I'm mentally disturbed about the whole issue." Smith continued, "Y'all are overlooking the point. [¶] It's my right. I have a mental problem. I got triple C.N.S. I have a history of this. In 1984—since 1984, I've been in the hospital twice."

The court responded, "Sir—number one, motion to relieve him as counsel, since you have no counsel to continue this trial, is denied. I don't find there's a conflict of interest. It was not as though you attacked him. You attacked yourself." "As far as your mental illness," the court continued, "sir, you've never displayed it in this courtroom during the time that this case was—has been here. So I'm warning you that you are to—you can control yourself. And I watched you control yourself. [¶] This case is going to continue. If you continue to have outbursts, sir, you will either be shackled in front of the jury or removed. And my preference would be you be removed. [¶] I don't want to

shackle you in front of the jury. But you are to conform your behavior to what you can do. Your move was very calculated yesterday—on Friday."

After the courtroom incident, trial proceeded. Smith remained highly involved in decisions about the conduct and course of the trial, actively discussing with the court what prior convictions would be used against him if he testified; asking what the consequences would be to him of admitting his prior convictions; asking the court to impose a lesser sentence via a negotiated disposition; correcting the court concerning his prior criminal history; and requesting a minute order setting forth what time he had left to serve. Ultimately, Smith was convicted of possessing a controlled substance for sale and sentenced to a total term of 11 years in state prison. He appeals.

DISCUSSION

Smith appeals his conviction on the basis of the court's failure to conduct a competency hearing after his outburst in the courtroom. If a doubt arises in the mind of a trial judge as to the mental competence of a defendant, the judge is required to state that doubt for the record and to inquire with the defendant's counsel as to counsel's opinion on the defendant's competence or to appoint counsel for this purpose if the defendant is representing himself or herself. (§ 1368, subd. (a).) Moreover, when there exists substantial evidence of incompetence, the trial court is required to declare a doubt and to conduct a full competency hearing. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1064.) Evidence is substantial if it raises a reasonable doubt about the defendant's competence to stand trial. (*Ibid*.) If the evidence is less than substantial, a court's decision whether to order a competency hearing is reviewed for an abuse of discretion. (*People v. Welch* (1999) 20 Cal.4th 701, 742.) If, however, "there is a reasonable possibility, even if it does not rise to the level of substantial evidence, that the defendant is unable to understand the proceedings or assist in his defense, the trial court must order a psychiatric examination before deciding there is no need for a section 1368 hearing." (*People v. Campbell* (1987) 193 Cal.App.3d 1653, 1663.)

Smith claims that his conduct and statements to the court raised a reasonable doubt as to his competence, mandating a competency hearing under section 1368, or that he at least should have received a psychiatric examination before making a decision about whether to proceed with a competency hearing. We disagree. Smith did not present substantial evidence raising a reasonable doubt about his competence to stand trial. He had been actively involved in managing and planning his defense for well over a year: making motions, requesting and obtaining continuances, securing the services of an investigator, examining a witness during a hearing, representing himself at times during the process, addressing grievances with his counsel repeatedly to the court by means of *Marsden* motions, and involving himself in jury selection. Smith demonstrated that he was able to understand the proceedings against him and to function as an advocate for himself in the courtroom. While actual suicide attempts or suicidal ideation may, in combination with other factors, constitute substantial evidence raising a doubt regarding a defendant's competence (*People v. Rogers* (2006) 39 Cal.4th 826, 848), the trial court here was not convinced, nor does the record compel the conclusion, that Smith's conduct constituted a suicide attempt.[5] When Smith's mistrial motion was denied, he went right back to active, and often successful, participation in his defense. There was no substantial evidence that Smith was incompetent, nor can we say that this evidence indicates a "reasonable probability" that Smith was unable to understand the proceedings

[5] Smith attempted to injure himself in open court, where he was under observation by the bailiff, the trial judge, court staff, counsel, jurors, and spectators; and he chose a means of hurting himself that would require some time to succeed. Under these circumstances any person would have to know that he or she would be stopped quickly and that medical aid would be immediately forthcoming. Smith's conduct, therefore, suggests a calculated effort to derail the trial rather than an attempt to commit suicide. In this regard this case differs from *United States v. Loyola-Dominguez* (9th Cir. 1997) 125 F.3d 1315, in which the defendant hung himself in the relative isolation and solitude of his jail cell, demonstrating a far more concrete suicidal intent than Smith's. *Loyola-Dominguez* is also distinguishable because there, other evidence showed that the defendant lacked a full grasp of the nature of the proceedings (*id*. at p. 1319), while here, the evidence tends to show that Smith was aware of the nature of the proceedings and was fully able to assist counsel in presenting a defense.

or assist in his defense, which would necessitate a psychiatric examination prior to proceeding. (*People v. Campbell*, *supra*, 193 Cal.App.3d at p. 1663.)

Accordingly, the decision whether to conduct a competency hearing was within the trial court's discretion. "When the trial court's declaration of a doubt is discretionary, it is clear that 'more is required to raise a doubt than mere bizarre actions [citation] or bizarre statements [citation] . . . .' [Citation.]" (*People v. Welch*, *supra*, 20 Cal.4th at p. 742.) The court, which by this time had observed Smith on several occasions, believed Smith to be competent to stand trial. It found Smith's behavior to be "calculated, absolutely calculated, to attempt to get a mistrial," noting that Smith had waited until the bailiff had moved over to the jury box before using his weapon on himself. Particularly in light of Smith's extensive and active participation in his defense at all stages of the court proceedings and his transparent attempt to compel a mistrial, we cannot say that the trial court abused its discretion in proceeding without ordering a competency hearing or psychiatric examination. (*People v. Marks* (2003) 31 Cal.4th 197, 220 [appellate court defers to trial court determination on competency hearings because it is not in a position to """"appraise a defendant's conduct in the trial court as indicating insanity, a calculated attempt to feign insanity and delay the proceedings, or sheer temper""""].)

DISPOSITION

The judgment is affirmed.

ZELON, J.

We concur:

WOODS, Acting P.J.

JACKSON, J.